SHELL MALAYSIA TRADING SDN BHD

v.

PERUSAHAAN BANYU EMAS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-572-1997]
13 FEBRUARY 1998

CIVIL PROCEDURE: *Stay of proceedings - Order for sale - Foreclosure proceedings pending - Dispute on contractual rate of interest - Whether proper forum - Whether special circumstances warranting a stay - Cause to contrary*

CIVIL PROCEDURE: *Stay of proceedings - Order for sale - Foreclosure proceedings pending - Contractual issue raised - Whether appropriate for judge to decide on disputed issue - Distinction between duty of judge in foreclosure proceedings and in civil suit*

The plaintiff had appointed one Harmony Creations Sdn Bhd ('Harmony') as the dealer for their products. Pursuant to cl 7 of the dealer agreement, Harmony was granted a credit facility secured by a third party charge by the defendant over two pieces of land and the continuing guarantee and indemnity executed by one Ithnin Yacob and one Tumar Yacob ('the guarantors').

Harmony was unable to meet the repayments and the plaintiff filed an application for *inter alia* an order that the said land be sold by public auction to satisfy the outstanding sums due to the plaintiff. The plaintiff's writ ('the D5 suit') was later served on the defendant's solicitors who accepted service on behalf of Harmony and the guarantors. The defendant's solicitors immediately filed the present application for a stay of proceedings pending the disposal of the D5 suit on 7 November 1997. In the application for a stay, there was a further prayer that in the event Harmony and the guarantors were successful in their application to set aside the D5 suit, then the proceedings should be stayed pending arbitration between the parties. The three defendants in the D5 suit filed an application to set aside the writ on 17 November 1997.

In the application for stay, the defendant disputed the plaintiff's right to levy interest on any purported outstanding moneys at the rate of 1.5% per month, as provided in cl 7(v) of the dealer agreement, as the plaintiff had in various statements of accounts stated that the interest to be levied was only 1% per month. The defendant also contended that the matter should be referred to arbitration pursuant to cl 31 of the dealer agreement.

The plaintiff argued that the present proceedings dealt with the question of an order for sale and whether it ought to be granted and in so far as these proceedings were concerned, there was no dispute by the defendant as to the rate of interest. On arbitration, the plaintiff submitted that there was no contractual document between the plaintiff and the defendant to show that arbitration proceedings ought to apply.

Held:

[1] An order for sale is an *'ad rem'* remedy and these proceedings could not be the forum for ventilating any contractual dispute allegedly existing between the parties. The issue here was whether or not the order for sale ought to be granted.

[1a] An allegation that a chargee acted in breach of contract, while it may give rise to an independent action *in personam*, is insufficient *per se* to defeat the *ad rem* rights of a chargee under a registered charge to an order for sale. Therefore, the dispute as to the rate of interest would not suffice as a cause to the contrary, as it related to an allegation of breach of contract and thus would give rise if necessary to an action *in personam*.

[2] As an alleged dispute as to the rate of interest cannot amount to a cause to the contrary to prevent an order for sale from issuing, there was no reason why these proceedings have to be stayed pending a resolution of the alleged dispute.

[3] After the plaintiff issued a letter of demand to the defendant herein and to Harmony, Harmony admitted the debt. Harmony did not in that letter of admission raise any dispute regarding the interest rate or qualify its admission in any way. In so far as these proceedings were concerned, the defendant's debt arose from Harmony's debt and as Harmony had admitted the same, there was therefore no dispute with regard to the interest rate. Furthermore, the dealer agreement stipulated that the plaintiff "reserves the right to levy a late payment interest charge of 1.5% on all overdues not settled by the due dates."

[4] The duties of a judge in foreclosure proceedings and those in civil suits where the contractual relationship between the parties is in issue are quite distinct and the judge ought not to in the foreclosure proceedings make a determination on any issue raised by the defendant.

[5] There was no arbitration clause in the charge document which formed the basis of the relationship between the plaintiff and the defendant.

[Application for stay dismissed.]

Cases referred to:

Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290 ***(refd)***

Low Lee Lian v. Bank Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1991] 3 CLJ 2400 ***(refd)***

For the plaintiff - K Shanti Mogan; M/s Shearn Delamore & Co

For the defendant - Christie Soosay Nathan; M/s Christie Soosay Nathan & Assocs

Reported by Cindy Chan

JUDGMENT

RK Nathan J:

The Application

This application of the defendant (encl. 11) is for an order for a stay of the present proceedings pending the hearing and final disposal of a suit filed in the Commercial Division in Kuala Lumpur, namely D5-22-1008-97 (the D5 suit) between the present plaintiff and Harmony Creations Sdn Bhd (Harmony), Ithnin bin Yacob and Tumar bin Yacob. There was also a prayer that in the event the defendants were successful in setting aside the said suit then these proceedings ought to be stayed pending arbitration between the present plaintiff and the same three defendants. There was also a prayer for costs.

Facts

Pursuant to a dealer agreement dated 6 April 1988, the plaintiff appointed Harmony as the plaintiff's dealer for the sale of the plaintiff's products to government and quasi-government bodies in Malaysia. Subsequently by a letter dated 6 April 1994 (the letter agreement) the plaintiff had appointed Harmony as its dealer regarding the supply of plaintiff's products by Harmony to certain government offices in Peninsular Malaysia for a period beginning 1 August 1994 till 31 July 1996. Pursuant to cl. 7 of the letter agreement Harmony was granted a credit facility. The following were executed as security for the said credit facility to Harmony, namely:

(a) A charge by the defendant over its lands held under H.S.(D) 793 and 794 for P.T. Nos: 264 and 265 both in the Mukim of Ujong Permatang (the said lands) in favour of the plaintiff.

(b) Continuing Guarantee and Indemnity executed by Ithnin bin Yacob on 13 December 1994.

(c) Continuing Guarantee and Indemnity executed by Tumar bin Yacob on 13 December 1994.

The plaintiff had filed this originating summons (encl. 1) and *inter alia* prayed for an order that the said lands be sold by public auction to satisfy the outstanding sums due and owing to the plaintiff by Harmony pursuant to the letter agreement. On 28 October 1997 both parties made substantial submissions on the originating summons. On the same day the plaintiff's solicitors enquired from the defendant's solicitors whether they had instructions to accept service on behalf of the said defendants in the D5 suit. On being notified that they had instructions, the plaintiff's solicitors served the writ on the defendant's solicitors on 5 November 1997. Immediately the defendant's solicitors filed this application for stay (encl. 11) on 7 November 1997. In the meantime, the three defendants in the D5 suit had on 17 November 1997 filed an application to set aside the said D5 suit.

The Case For The Defence

The defendant herein contends that these present proceedings are against the Third Party Chargor, whereas the D5 suit is against the principal debtor and the two guarantors. Notwithstanding, it was submitted that the subject matter of both proceedings is the same, namely, the purported debt that was owing to the plaintiff.

Further, the defendant referred me to the D5 suit which was exhibited to the affidavit in support of encl. 11 and in particular to para. 16 of the statement of claim wherein the plaintiff had claimed interest on the outstanding amounts at the rate of 1.5% per month. The plaintiff had also maintained this view in an affidavit filed to oppose encl. 11. The defendant however disputes the entitlement of the plaintiff to levy interest at the rate of 1.5% per month on any purported outstanding monies. The gist of the defendant's argument is that whilst by cl. 7(v) of the letter agreement the plaintiff had reserved the right to levy interest on outstanding amounts at the rate of 1.5% per month, the plaintiff had nevertheless in various statements of accounts stated that the interest to be levied on outstanding amounts was only 1% per month. It was the case of the defendant that since the plaintiff did not levy interest at 1.5% per month and instead levied interest at 1% per month as evidenced in the various statements of accounts, the plaintiff is, therefore, precluded from claiming an interest rate of 1.5% per month. The defendant also argued that the provision of the arbitration clause as stated in cl. 31 of the dealer agreement should mean that the matter ought to be referred to arbitration. The defendant urged me to rely on *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1988] 2 MLJ 184 where the then Supreme Court held that it is undesirable to allow a situation where two different courts should try and determine the same issues between the same parties relating to the same subject matter.

The Case For The Plaintiff

The plaintiff argued that these proceedings deal with the question of an order for sale and whether it ought to be granted. The plaintiff also pointed out that in so far as these proceedings were concerned there was no dispute by the defendant as to the rate of interest. With regard to the reference to arbitration it was the plaintiff's case that there was no contractual document between the plaintiff and the defendant showing that arbitration proceedings ought to apply.

Court's Findings

Ad Rem Remedy

It is obvious that an order for sale is an "*ad rem*" remedy and that these proceedings cannot be the forum for ventilating any contractual dispute allegedly existing between the parties. The issue here is whether or not an order for sale ought to be granted. In *Low Lee Lian v. Bank Hin Lee Bank Bhd* [1997] 1 MLJ 77 the Federal Court said at p. 85:

> ... it is important to distinguish between rights ad rem and rights *in personam.* That the Code expressly preserves this distinction was recognised by so learned a judge as Raja Azlan Shah J ...
>
> In the present context, an action brought to set aside a charge upon one or more of the grounds of defeasibility specified under s. 340 of the Code is an action in rem. For when it succeeds, the consequence is to set at naught the chargee's rights under the registered charge as against the whole world. On the other hand, a chargor who is able to demonstrate that the chargee is under a personal obligation that binds his conscience not to enforce the charge, though not in a position to bring his case within one or more of the exceptions to the indefeasibility provision may nevertheless proceed to enforce that obligation against the chargee. This is an action *in personam.*

The Federal Court recognised three grounds on which a cause to the contrary could be identified, namely:

(i) When a chargor could bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code.

(ii) When the chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale.

(iii) When a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

The highest Court in the land went on to hold that unless the chargor could bring himself within one of the three categories of cases abovementioned, no cause to the contrary could be shown and the Court would be obliged to make an order for sale. It was also held that an allegation that the chargee acted in breach of contract, while it may give rise to an independent action *in personam*, was insufficient per se to defeat the *ad rem* rights of a chargee under the registered charge to an order for sale. It is my judgment therefore that a dispute as to the rate of interest would not suffice as a cause to the contrary, as it relates to an allegation of breach of contract and thus will give rise if necessary to an action *in personam.*

In fact in *Low Lee Lian* the Federal Court stated that the increase in the rate of interest without the proper notice would not constitute a cause to the contrary. In the circumstances I hold that as any alleged dispute as to the rate of interest cannot amount to a cause to the contrary to prevent an order for sale from issuing, there is no reason why these proceedings have to be stayed pending a resolution of that alleged dispute.

In any case I find that there is no dispute as to the rate of interest. The letter agreement stipulates that the plaintiff "reserves the right to levy a late payment interest charge of 1.5% on all overdues not settled by the due dates".

I find that after the plaintiff had issued a letter of demand to the defendant herein, and to Harmony, Harmony admitted to the debt. Harmony did not in the letter of admission raise any dispute regarding the interest rate or qualify its admission in any way. In so far as these proceedings are concerned, the defendant's debt arises from Harmony's debt and as Harmony has admitted the same, there is therefore no dispute with regard to the interest rate.

Arbitration Clause

There is no arbitration clause in the charge document which forms the basis of the relationship between the plaintiff and the defendant. It is pertinent to draw to mind the timely observation made by the then Supreme Court in *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 when it said at p. 314:

> ... It is regrettable that contractual provisions for arbitration can sometimes be abused. We wish to emphasize that surely it is not the intention of s. 6 of the Act to confer on a defendant the privilege of delaying proceeding to enable him to put off the day of judgment indefinitely. It should be the duty of everyone involved to see that the matter be expeditiously resolved.

It is to be noted that the *Lesco* case relied on by the defendant presupposes that the issues raised in the civil and foreclosure proceedings are the same and as such one court ought to hear both matters. However in *Low Lee Lian* the Federal Court expressed its view that the duties of the judge in the foreclosure proceedings and the duties of the judge in the civil suit (where the contractual relationship between the parties is in issue) are quite distinct and that the judge ought not to, in the foreclosure proceedings, make a determination of any issue raised by the defendant. In fact expressing its view specifically to this issue the Federal Court said in *Low Lee Lian* at p. 89:

> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the chargor's action.

As such I prefer to apply the decision in *Low Lee Lian* rather than to rely on *Lesco*. In any case, even if the decision in *Lesco* is to apply, in that case, the suit that was filed later was stayed. In this case, these proceedings were filed before the D5 suit and has been substantially submitted upon by both parties before being adjourned. It would therefore follow that if any proceedings ought to be stayed it ought to be the D5 suit.

I have no hesitation therefore in dismissing this application for stay, that is, encl. 11, with costs.